IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED: 11 September 2020

CASE NO: 19/41390

In the ex parte application:-

THE STANDARD BANK OF SOUTH AFRICA LIMITED APPLICANT

And

MATSE, SIYABONGA WILLIE RESPONDENT

In *re* the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED PLAINTIFF

And

MATSE, SIYABONGA WILLIE DEFENDANT

REASONS FOR ORDER

(HEARD OVER ZOOM PLATFORM 11 SEPTEMBER 2020)

SNYCKERS AJ

INTRODUCTION

1. Section 129(1) of the National Credit Act 34 of 2005 ("NCA") has accounted for forests of paper and oceans of ink. This is due partly to the uncertainty surrounding its interpretation before the introduction of section 129(5), effective in March 2015,[1] because it referred to an obligation[2] to *"draw to the notice of*

[1] By the National Credit Amendment Act 19 of 2014.
[2] Although s129(1) employs the term "may" in respect of the notification it envisages, section 130 makes it clear that the "delivery" it says s129(1) entails is a prerequisite for instituting debt-enforcement process under a regulated Credit Agreement.

the consumer in writing", without specifying how this was to be done. This took the section on two important journeys to the Constitutional Court,[3] and prompted the legislature to enact section 129(5), to decree how the delivery envisaged in section 129(1)(a) was to occur.

2. Section 129(5) reads:

> *(5) The notice contemplated in subsection (1) (a) must be delivered to the consumer-*
>
> *(a) by registered mail; or*
>
> *(b) to an adult person at the location designated by the consumer.*

3. How much room is there for deviation from these dictated methods of delivery?

4. What happens when, as in the instant case, the "location designated by the consumer" appears to be a non-existent address? In such a case, there can be no effective registered mail sent to such address, nor can there be service to an adult person at such address.

5. In the instant case, the applicant sought "substituted service", invoking Rule 4(2), of a s129(1)(a) notice. It gave evidence of the fact that the sheriff could not locate the address designated by the consumer in the agreement as the *domicilium citandi et executandi*, nor could the post office effectively despatch registered mail notifications to any such address.

---

[3] *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) and *Kubyana v Standard Bank of SA Ltd* 2014 (3) SA 56 (CC).

6. Personal service was attempted, but the consumer could not be traced. Tracing agents were employed, to no avail. Property, other than the *domicilium* address, was identified, of which the consumer (respondent) appeared to be the owner.

7. Some communication had occurred with the consumer by electronic mail, and a last known email address was therefore available.

8. Various methods of "substituted service" were suggested, including publication in the *Government Gazette* or in a local newspaper, service by email to the email address, and service on a person, or by affixing, at the address in Ivory Park believed to be property owned by the defendant.

LEAVE TO BYPASS SECTION 129(5)?

9. The appropriateness or likely efficacy of the suggested methods aside, the question arose whether a court could give leave that a s129(1)(a) notice be delivered in a manner other than, and accordingly contrary to, the provisions of s129(5).

10. Recourse to s65(2) of the NCA appeared futile, as this section applied where there was no prescribed method of notification. I revert to this below. Section 65(1) also provides rather peremptorily:

> *"Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any."*

11. It should be noted that a literal interpretation of section 129(5) read with s65(1), as codifying the *only* means by which delivery under s129(1)(a) could be effected, would entail the apparent absurdity that undeniable and effective

personal service, if not effected at the *domicilium* address, would not be compliant.

12. Not only would this be absurd, and against the general principle that personal service is always effective and included where more indirect methods of service are decreed; but it would appear to me necessarily to be contrary to the decision of the full court of this division in *Benson*, [4] paragraph 19 of which makes it clear that the court regarded effective personal notification, by means other than through delivery of a s129(1)(a) notice by the prescribed method, as compliance with section 129(5).

13. The problem with following *Benson* in the instant case is three-fold:

    13.1. The method of notification that was held to be effective in *Benson* was personal; and in the instant case leave is sought to authorise methods of notification that would not be personal.

    13.2. *Benson*, although expressly decided in the context of an apparent assumption that s129(5) was applicable and governed the notifications at issue,[5] was in fact concerned with notices delivered in 2011, long before section 129(5) was introduced into the NCA.

    13.3. The finding in paragraph 19 was *obiter*, in that it had already been decided that the appeal was to fail on the basis that there had been

[4] *Benson and Another v Standard Bank of South Africa (Pty) Ltd and Others* 2019 (5) SA 152 (GJ).
[5] See paras 10, 11 and 13.

proper compliance with the requirements of s129(5) with respect to the registered mail postings at issue.[6]

14. I am bound by *Benson*, but am not sure it fully assists the applicant in the instant case. Its paragraph 19 can, and probably should, be taken as authority that s129(5) is permissive in the sense that it does not exclude or prohibit *more effective and more direct forms of notification than the indirect forms it authorizes*, and that personal notification, in whatever written form it occurs, suffices for s129(5) compliance.[7] But *Benson* cannot be extended to hold that a court may authorize other indirect forms of notification than those specified in s129(5), that do not entail personal notification, as ways of complying with s129(5).

15. An email that is proved to have been received by the consumer would, in my view, amount to personal and more effective written communication than the methods prescribed in s129(5), and, if the reasoning employed in paragraph 19 of *Benson* were to be followed, this would presumably suffice for compliance with that section (rather than be a bypassing of the section). But that does not include an email sent without proof of receipt by the consumer.

16. Service on some unspecified adult at a property thought to belong to the consumer, but not designated as the chosen address as contemplated in

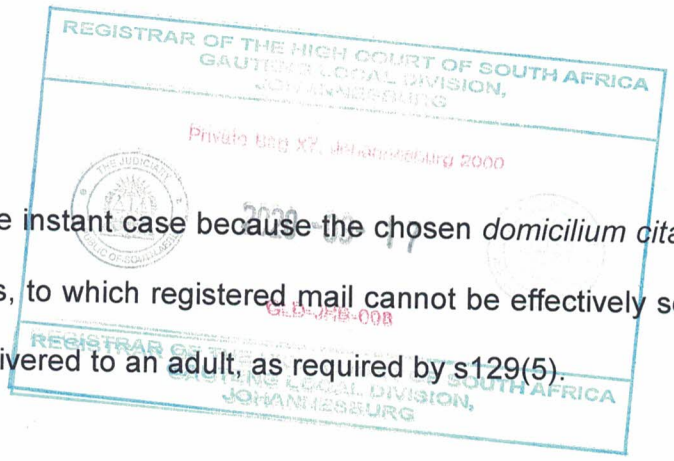
[6] Paragraph 13. This was despite the fact that s129(5) was not in existence when the notification at issue was sought to be delivered by registered mail.
[7] This concededly strains the interpretation of s168(a), which determines that delivery to the person in question is effective service of a document "unless otherwise provided in this Act". Section 129(5) read with section 65(1) certainly appears at face value to be such an instance where the general permission in s168(a) would *not* apply.

s129(5), would not, it would seem to me, amount to compliance – unless actual personal receipt on the part of the consumer were to be proved.

17. There is also a fundamental difference between using *Benson* or other methods of interpretation to avoid absurdity in *interpreting what constitutes compliance with s129(5)*, on the one hand, and holding that a court may authorize, whether in advance or by way of condonation, non-compliance with the section, on the other hand.

18. I have grave reservations that a court has this power, and find it probably does not, given the peremptory language of section 65(1) read with section 129(5).[8]

AN ESCAPE



19. The problem arises in the instant case because the chosen *domicilium citandi* is a non-existent address, to which registered mail cannot be effectively sent, nor any document be delivered to an adult, as required by s129(5).

20. In such a case, there is simply no chosen address, and the provisions of s129(5) may be held not to apply. The provisions of s65(2), however, once again refer to a manner chosen by the consumer, and do not cater for the situation where the consumer designated a non-existent *domicilium* and then cannot be traced to choose a method. Section 65(2) provides as follows:

(2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must-

[8] See generally the discussion in *Vlok NO & Others v Sun International South Africa Ltd & Others* 2014 (1) 487 (GSJ) paras [37] to [53].

(a) make the document available to the consumer through one or more of the following mechanisms-

(i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;

(ii) by fax;

(iii) by email; or

(iv) by printable web-page; and

(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).

21. It would seem to me that in the circumstances, I must, or at least may, regard the chosen address to be fatally defective for the purposes of s129(5) and, instead of purporting to authorize a deviation from the section that does not entail personal service, create the most sensible constructive *domicilium* for purposes of the section, to the extent that it still applies in the circumstances, and, in the alternative, deem the section simply not to apply and apply a constructive choice on the part of the consumer of the email method specified in s65(2)(iii).

22. In these circumstances, I granted leave for a s129(1)(a) notice to be served by doing so *both* at the Ivory Park property on a person apparently in charge over 16 years of age *and* by utilizing the specified email address, affording the respondent one month from the performance of the last act within which to respond.

Frank Snyckers

Acting Judge

11 September 2020